



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE MARTIN
Members Ms T Bryant
Ms C Edwards

BETWEEN: Mr Alexander Oppong Claimant
and
London Underground Limited Respondent

ON: 12-16 December 2016

APPEARANCES:

For the Claimant: Mr Butler - Counsel

For the Respondent: Ms Thomas - Counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that the Claimant's claims are dismissed

RESERVED REASONS

1. By a claim presented on 18 February 2016 the claimant claimed unfair dismissal and disability discrimination. The response presented on 24 March 2016 denied the claims in their entirety.

The hearing

2. The Tribunal heard from the Claimant and on his behalf from Mr Cochrane (union representative).

3. The Tribunal heard from the following witnesses for the Respondent: Ms Frances McConnell; Mr Gary Rogers and Mr Dominic Paul.
4. The Tribunal had before it an agreed bundle of documents numbered to 530.

The issues

5. The issues were agreed by the parties at a preliminary hearing held on 22 April 2016 and are set out in the appendix to this judgment.

The Tribunal's findings

6. The Tribunal has found the following facts on the balance of probabilities having heard the evidence and considered the documents. The submissions made by both parties were considered. These findings of fact are confined to those facts that are relevant to the issues to be determined and necessary to explain the decision reached. All evidence was considered even if not specifically set out below.
7. The Claimant is an experienced member of staff. He was employed by the Respondent from 2002. He obtained a 'ticket office licence' in 2004. Staff working in the ticket office had to have this. The Claimant became an accredited Coach and as such is required to train others in the Respondent's 'Accounting' and 'Cash Handling' practices. He was appointed a Station Supervisor in May 2014. His employment was summarily terminated on 9 October 2015.

Policies

8. The Respondent has various policies. Those relevant to this case include a Surplus & Loss (S&L) procedure which is designed to monitor and improve performance in respect of discrepancies and provides for notification, monitoring and review of performance; a '*Standard of Business Ethics*' which places an obligation on employees to provide accurate records and '*account*' for all money and a formal disciplinary procedure which provides that it is the mechanism for dealing with breaches of policies and Standards. The Claimant's case is that he did not know of the Standard of Business Ethics policy itself, but was aware of the principles that underlined it and his obligation to account for all money.
9. The Tribunal heard from the Respondent witnesses and from Mr Cochrane who gave evidence on behalf of the Claimant that the Respondent's practice is to deal with patterns of high value losses by way of Revenue Investigation under its disciplinary policy rather than under the S&L process which is more about improving performance. Mr Cochrane said he had been involved in number in recent years. The Tribunal accepts that if there are losses which an employee is unable to explain after investigation this is treated as a gross misconduct matter and the practice is to charge the employee with a 'Failure to Account' ie a breach of the Business Ethic Standard and hold a Company Disciplinary Interview (CDI). The Tribunal was shown documentation that

showed that the Respondent had disciplined and dismissed several employees for 'failure to account'.

10. As the Respondent's industry is safety critical, it has a policy or practice that employees must tell their managers if they are taking medication. Some medications will result in an employee not being able to undertake a safety critical role, or a role involving the handling of cash. Other medications can be taken without restrictions on duties being imposed. The Respondent would ask occupational health for its advice on medications and the affect if any they had on the person taking them.

Ticket office processes and accountability

11. The Claimant's role involves him undertaking a variety of tasks including serving members of the public, for example topping up their Oyster cards, and dealing with or 'servicing' the ticket office machines 'TOMs' and the passenger operated machines 'POMs'. The servicing of the POMs could involve 'floating' the machine i.e. putting in or removing money. All transactions that the Claimant undertook were recorded on the Station Accounting Facility ("SAF"). At all times the Claimant was accountable to the Respondent for the cash under his watch.
12. The procedure for servicing the TOMs is that the individual should use their TSID card to 'unlock' the machine. This card is personal to an individual employee. Inside the machine is a coin vault and a note vault which needs to be emptied from time to time. These vaults are locked and can be unlocked using a key in the office. There is a mechanism known as 28e which allows the employee to see how much money the machine 'thinks' is being taken out. This is not always completely accurate and therefore procedure is for the money to be physically counted. The Tribunal heard that there was a machine to count coins but that notes had to be counted by hand. The amount counted is the amount that should be entered on SAF and not the 28e figure. If there is a difference between the two figures the practice would be to make a note of the discrepancy in the staff log book.
13. Discrepancies may arise for because of an issue with a £5 or £10 being misread. These amounts would be small. At other times, there may be a larger discrepancy (over a thousand pounds) which is due to an error in recording when the money was removed. This second type of error is not a loss and it is usually possible to reconcile the accounts and find the money. In those circumstances no action is taken against an employee.
14. During a shift those working in the ticket office have a drawer which contains their money and should be kept secure. The Tribunal heard from the Claimant and Mr Cochrane that the drawers could not be locked. This was all drawers and not just the Claimant's drawers.
15. At the end of the day there is a system of 'blind accounting' where the ticket seller's money is placed in a bag and sealed with their identification number

attached, without being counted. A security company collects the bags and they are opened (under CCTV observation) and the money is counted. If the amount of money in the bag when counted is less than it should be according to the accounting records the company contacts the Respondent's Finance Department. The Finance Department investigates and in most instances, there is no money missing and the discrepancy is explained when the accounts are reconciled. It is only at the end of the full period of reconciliation which can take up to eight weeks, that it will be clear if money appears to be missing. Reconciliation is a long and detailed process. If there are patterns of losses over £50, high value losses, or lower value losses with a pattern this will be passed to the Revenue Investigation Team to investigate.

The Claimant's medical conditions

16. The Claimant had several medical conditions for which he received treatment and took medication whilst employed by the Respondent. The underground is a safety critical environment and the Respondent takes advice from Occupational Health about medication and adjustments for employees. The Respondent also operates procedures by which it records and monitors absences and lateness. It has standard forms to be completed following interview when an employee returns from an absence or is late for work.
17. In around July 2013 the Claimant injured his thumb at work and he began to experience pain in his left, non-dominant, hand and commenced a period of sickness absence in or around November 2013. The Respondent referred him to Occupational Health (OH) who examined him and the Claimant said he was taking Gabapentin. OH produced a report in January 2014 with the advice at that time that the issue was unlikely to be linked to his thumb injury and that the Claimant was fit for restricted duties which included no heavy lifting or repeated or prolonged use of the left arm. It recommended that the Claimant start on 3-4 hours initially.
18. The Claimant returned to work in January 2014 working reduced hours until March 2014. In March 2014, OH examined him and he said he was taking naproxen. OH reported that the Claimant said his symptoms were improving but he did not think he would be able to work more hours per shift. OH were unable to give a timetable for return to full duties and did not say that any further restrictions were necessary.
19. Around this time the Claimant applied to become a Station Supervisor and required a medical in accordance with the Respondent's policies and practices. The Claimant failed the medical due to his restricted hours.
20. By this time the Claimant had been either on sick leave or working with reduced hours for some five months. On 21 March 2014, the Claimant had a case conference with Mr Stacey and the PMA Ms Bardot. The PMA is an HR role. The Claimant told them that he could feel his hand getting better and the pain was easing. During the case conference the Respondent informed the Claimant that his reduced hours could not continue indefinitely and if he could

- not return to normal duties other options such as redeployment or medical termination might need to be considered. The Claimant informed Mr Stacey that he felt that he could return to full duties after his annual leave in April 2014 and was agreed that this would happen. After a discussion about adjustments the only restriction was 'no servicing of machines.' This was confirmed in an email where it was noted that he could not lift the coin vaults. The Claimant in his evidence said he also could not lift the notes vault. However, this was not part of what he told the Respondent in this meeting. The Claimant at the hearing also said that because of his hand condition he was unable to count money and that others did it for him. If this was the case, it was not something discussed with the Respondent in this meeting and presumably the Claimant made his own arrangements for someone to count the cash as the Respondent did not make this arrangement themselves. The Claimant raised this issue for the first time in his cross-examination. It did not appear in his claim form, the agreed list of issues or his extensive witness statement. The Respondent's witnesses were not questioned about this.
21. The Claimant returned to full time work in mid-April. On 22 April 2014, the Claimant was absent without explanation and on his return the next day Mr Tudor conducted a return to work interview in accordance with the Respondent's normal practice. In the record of that interview it was recorded that the reason for the absence had been a hospital appointment, that the Claimant was not on medication and it was that the restriction of no heavy lifting via the servicing of the coin/note vault was still in place. The Claimant signed this document. The Claimant accepts he did not report to work and did not contact the workplace and says his appointment for an MRI ran late. Mr Tudor said that the Claimant would be paid for that day, but that he should take it as a day's annual leave as he had not given the proper notification of his absence. The Claimant says this demonstrates the antipathy that Mr Tudor had towards him. The Tribunal find that Mr Tudor was exercising his management functions in a normal way as would be done for any employee who failed to report to work.
22. Mr Stacey re-referred the Claimant to OH in May 2014 noting in the referral that the Claimant had been completing a full range of duties for 5 weeks without any issues. Mr Stacey knew why the Claimant was not appointed a station supervisor and decided he could be assessed again for the role of Station Supervisor. OH examined the Claimant. The Claimant's case is that this examination was cursory and only did sight, hearing etc. However, the Tribunal has seen the OH report and the examination was much more than this. Clearly there was a full examination of his hand. The OH report said that the Claimant met the medical requirements for returning to full duty and promotion to Station Supervisor.
23. In relation to the Claimant's hand issue, the report noted that it had 'Improved over time...in past 5 weeks he worked full time with no issues/nor use of medication....L hand examination ...grip is normal and equal, able to do all range of movements no pain mentioned'. The only medication mentioned in the report was for blood pressure. The Claimant was appointed to the role of

Station Supervisor. The Tribunal finds that there is no record in the documentation of the Claimant reporting to the Respondent that he was taking other medication. The Claimant's case is that he took medication including diazepam and naproxen. His evidence was not consistent in that he said he only took medication at night; he took medication at work; he only took medication when needed; he took medication on all the days he was investigated for failing to account and that the medication made him fall asleep at work. Given that there is no other evidence, the Tribunal find on the balance of probabilities that whilst the Claimant may have been taking this medication he did not notify the Respondent he was taking this medication. If he had, there would be records from OH about the effect of the medication and how it would impact on his job.

Effect of the injury to the Claimant's hand

24. In cross examination, the Claimant said that he was only able to work with one hand and therefore was unable to count the money. As noted above this was not mentioned in the meeting with Mr Stacey recorded above. It was also not recorded in any advice given from OH who had recorded a full range of movement in its report which cleared him for full duties and promotion to Station Supervisor. The Tribunal could not find any documentation to suggest that the Claimant told the Respondent he could not use his left hand at all, or to suggest that the Respondent noticed this.

Mr Tudor and Mr Stacey

25. Mr Stacey was the General Station Manager (later retitled Area manager). Mr Tudor was the duty manager reporting to Mr Stacey and directly line managing the Claimant. The Claimant's case is that Mr Tudor 'had it in for him' and wanted him out of the business because of the difficulties caused by the adjustments he required because of his medical conditions.

26. He cited the meeting he had with Mr Tudor on 22 April 2016 set out in paragraph 21 above. As the Tribunal has found this was a routine meeting and handled in an appropriate manner given the circumstances.

27. The Claimant also cites a referral to OH prior to his hand injury when he returned from a period of sickness. Before this some special arrangements had been put in place by his line manager at the time (Mr Farrell). By the time he returned to work Mr Tudor had become his line manager. The Claimant's case is that in April 2012 Mr Tudor treated him unfavourably and in particular by telling the Claimant to take his recommended rest in the mess room rather than in the GLAP. The GLAP is a booth with a stool by the ticket gates on the station concourse. There is a record of this meeting which records that Mr Tudor explored the Claimant's concerns with the arrangements put in place by Mr Farrell and agreed different adjustments relating to the type of work, rest and sitting down. Mr Tudor signed the note recording that the Claimant refused to sign as he did not believe the changes would happen. The Tribunal finds on the balance of probabilities this document is an accurate

- reflection of what occurred and that Mr Tudor as the Claimant's manager was entitled to take a different view of what was suitable for the Claimant and from an operational perspective and cannot see any disadvantage to the Claimant by changing the arrangements made.
28. The Claimant relies on an incident on 9 April 2012 when he says Mr Tudor treated him unfavourably when he came into work late. He accepts he was late. The documentation the Tribunal was referred to showed it was a different manager who met with him on this occasion and that the explanation he gave for being late was accepted. Given that this did not involve Mr Tudor and the Claimant's explanation was accepted this does not show any antipathy on the part of Mr Tudor.
29. Another matter relied on by the Claimant is a grievance he made to Mr Tudor telling him that he had a disagreement with a Station Supervisor Mr Beardsley regarding his start time and the Supervisor had asked him to see a manager at Victoria. Also on 20 May 2012 the Claimant sent a formal grievance to the Mr Stacey regarding the incidents on the 9th April 2012 and 4th May 2012. The Claimant's case is that this was a grievance about Mr Tudor. The Tribunal has considered this document and finds no mention of Mr Tudor anywhere in the grievance but rather mention other managers. The Claimant decided not to pursue the grievance. The Tribunal would find it odd that the Claimant would make a grievance about Mr Tudor and send it to Mr Tudor himself. If the grievance was about Mr Tudor, he would have no doubt have sent it to Mr Stacey to investigate.
30. The Tribunal's finding is that there is no evidence to suggest that either Mr Tudor or Mr Stacey (who recommended the Claimant for promotion to Station Supervisor when he could do full duties) 'had it in' for the Claimant or had any antipathy towards him.
31. Once the Claimant returned to work in May 2015 he continued to work in the ticket office throughout the rest of 2014. He was not qualified to act as the Station Supervisor in Brixton but following training did undertake the role in Pimlico. Until the matters which are set out below, the Claimant did not have any accounting errors reported to the investigation team. No other ticket sellers in Brixton had accounting matters reported to the investigation team in the period to which the disciplinary matters relate.

The disciplinary process

32. As set out above, there is a system of 'blind counting' in which neither the security firm or the Finance Department or the investigator know who the person is. All they have initially is their identification number.
33. In the first part of 2014 the finance department referred a case to Ms McConnell for investigation as a seller in Brixton had been experiencing a pattern of high value losses. At this stage Ms McConnell did not know the identity of the individual (only their 'number'). The individual was the

Claimant. The Claimant's records showed that between 9th December 2014 and 31st January 2015 the Claimant had suffered losses on 27 out of 32 shifts with the highest daily loss being £423.37.

34. Ms McConnell explained to the Tribunal the process involved in investigating unreconciled losses and the Tribunal is satisfied that this process is a complex and time consuming job. Not only are the Claimant's records examined but a large number of other records and reports not only for the days in question but also days before and after and in relation to everyone who worked with the Claimant had to be examined in case the money could be found there. Ms McConnell therefore decided to limited her investigation to 11 days losses which amounted to £1885.33. Ms McConnell explained that it takes about eight weeks for matters to reach her from the date in question.
35. Ms McConnell was unable to trace the missing money and her initial investigation was finished by 24th March 2015. She therefore conducted a fact-finding interview with the Claimant. This was the first time she had met the Claimant and the first time the Claimant was notified of the accounting issues. At that interview she asked the Claimant about how he undertook his role. He confirmed that he followed the correct procedure for emptying POMs namely that he was there all the time and that he counted the cash. and that he logged any issues in the log book. Ms McConnell took him through each of the transactions and provided him with the records that demonstrated the calculations. The Claimant was unable to explain the losses.
36. In cross-examination, the Claimant tried to distance himself from the record of this meeting by saying that what he described were what he would normally do, but that because of his impairment he did not do this. It was in this cross-examination that he said he could not use his left hand, he did not always stay to supervise the removal of the vaults from the POMs, did not count the cash. He did not say this to Ms McConnell. What he did say to her was that he had a problem with his hand and described that when he was on the window he had a pouch that he dropped Oyster Cards into for them to be read. He said it might not be reading the cards. Following the interview Ms McConnell reviewed the accounts to see if the totals were changing in line with Oyster card transactions and experimented to check that there was no issue with the cards being read and found there was none.
37. The Claimant's case is that the investigation undertaken by Ms McConnell was inadequate in that certain documents were not consulted including the Ticket Seller's handbook, and the Failure and Maintenance Registers and Report of Lost Ticket/Report of Lost Money forms kept by the GSM. Ms McConnell's evidence was that she had found the information which would have for example shown if the POMs or TOMs were malfunctioning by asking Cubic (the manufacturer) directly. She was told they were not malfunctioning. Additionally, she said that if they had been malfunctioning she would have expected the Claimant's colleagues working in the ticket office also to have accounting irregularities, however none did. Whilst Ms McConnell did not look at every document possible, the Tribunal finds that her investigation was

through and within the range of reasonableness expected from an employer of the Respondent's size and resources.

38. The Claimant was suspended on the 24 March 2015. Ms McConnell produced her report on 14 April. The Claimant was on leave for 8 weeks from 23 April 2015. Because of the report the matter was referred to the Claimant's managers for consideration of potential disciplinary action. On his return from leave the Claimant was invited to attend a fact-finding interview with Mr Tudor which was held on 16 July 2015. The Claimant's case is that Mr Tudor was not the appropriate person to do this interview for two reasons. The first being that he 'had it in' for him. The Tribunal has found this not to be the case. The second is because the Respondent's policy states that the investigation will be conducted by a local/immediate manager. Mr Tudor was the Claimant's immediate manager and at that time was the Acting Area Manager. The Tribunal finds he was an appropriate person to conduct the fact finding. The Tribunal has considered the record of the fact-finding interview. What Mr Tudor did was to take the Claimant through the report prepared by Ms McConnell and ask for his comments. The Tribunal find that the Claimant was given the opportunity to give comments during the meeting.
39. Mr Tudor considered that there was a case to answer and the Claimant was charged with gross misconduct. The charge was set out in a memo to the Chairman of the Company Discipline Interview and set out the dates it was alleged the Claimant failed to follow "rules and procedures on the handling of, or accounting for, company cash, goods or assets" together with the cash amounts involved.
40. The company disciplinary interview (CDI) took place on 3 September 2015 chaired by Mr Rogers. Mr Rogers had had no previous dealings with the Claimant and was independent. Mr Frew who had also not dealt with the Claimant before was part of the disciplinary panel. The hearing lasted for 3 hours 20 minutes including adjournments.
41. The Claimant's case is that the CDI was unfair because he produced a 26 page 'defence' at the hearing which he was not allowed to discuss and Mr Rogers relied on evidence obtained after the CDI which he was not allowed to comment on. The Tribunal has considered the record of the CDI. Whilst the Tribunal finds that it may have been better for Mr Rogers to have adjourned the CDI to consider the Claimant's defence, the Tribunal does not find that this was sufficient to render the dismissal unfair, as the Claimant had the opportunity to talk to Mr Rogers and Mr Frew during the CDI. Mr Rogers and Mr Frew questioned the Claimant and the Claimant and his representative made submissions.
42. In this hearing the Claimant confirmed (contrary to what he said in cross-examination) that when colleagues serviced the POMs for him he would be present and that if the money was counted for him he would be present (but when pressed he might enter the reference number [28e] instead of the actual number). He did not tell the panel that he left the money unattended with

whoever assisted him this was alleged only at the Tribunal hearing.

43. Following the hearing Mr Rogers and Mr Frew reviewed the 26 page 'defence'. This included 17 possible explanations for the missing money. They also followed up the issue of the Claimant's medical condition with Mr Tudor and Mr Stacey. Mr Stacey confirmed that they had previously been aware that the Claimant had been on medication but following his assessment for SS he had not informed them of any medication and he had not made complaints about his hand.
44. Mr Rogers and Mr Frew considered decided that the charge of 'failure to account' was upheld as they were not satisfied with the Claimant's explanation. The dismissal letter is comprehensive and sets out the possible explanations the Claimant had given. They rejected these explanations balance of probabilities as being plausible noting that for such significant sums to be attributable to these types of error short periods of time was unlikely. They concluded that the matter was serious given the sums of money involved, that the Claimant was in a position of trust, he was experienced and knew the processes and that dismissal was the appropriate penalty.
45. The Claimant appealed the decision and his appeal was heard by Mr Paul on 10 November 2015. The Claimant was represented by Mr Cochrane who gave evidence on his behalf and again presented a written document. It was agreed that that Mr Paul would take this away with him to read. Following the appeal Mr Paul interviewed Ms McConnell and sought further information in relation to matters such as the Oyster cards and whether there could have been a fault with the machines. He interviewed Mr Tudor and Mr Stacey. He put to Mr Tudor the Claimant's assertions that he had prejudged the matter. He also asked Mr Stacey about the Claimant's medical condition. Mr Stacey told him that he did not recall the Claimant contacting him about any issues regarding being dizzy or tired which the Claimant raised at the appeal. Mr Paul dismissed the Claimant's appeal by letter dated 8 December 2015.

Submissions

46. Both parties gave detailed written and oral submissions for which they are thanked. They are not set out here.

The Tribunal's conclusions

47. Having found the factual matrix set out above the Tribunal has come to the following conclusions.

Unfair dismissal

48. The Reason for dismissal is conduct. This is a potentially fair reason for dismissal.
49. The Tribunal has found the investigation to have been within the range of

- reasonable responses open to a reasonable employer of the size and administrative resources of the Respondent. The investigation by Ms McConnell was thorough and as set out above, even though not every possible document was looked at, the Tribunal is satisfied that she had obtained the information from other sources. The Respondent is not expected to carry out a forensically perfect investigation, the expectation is a reasonable investigation. The Tribunal finds the investigation to be reasonable.
50. The Tribunal has rejected the Claimant's argument that Mr Tudor was 'out to get him' for the reasons set out above. In any event, having considered the interview conducted by Mr Tudor, this was based on the investigation by Ms McConnell. He decided quite reasonably that the matter should proceed to a CDI. He was not involved thereafter and had no influence on the ultimate decision to dismiss.
51. The CDI and appeal were carried out by individuals who were independent. The Claimant was accompanied by a trade union representative at both hearings. The Tribunal has considered the records of the hearings and find that the Claimant was given the opportunity to put his case forward. Even though the Tribunal finds that it may have been better to adjourn the CDI and reconvene once the Claimant's document had been read, the Tribunal is satisfied that Mr Rogers did consider this document as shown by the dismissal letter which refers to the 16 possible explanations put forward by the Claimant. The Tribunal is satisfied having heard from Mr Rogers and having read the dismissal letter that other sanctions to summary dismissal were considered and rejected.
52. The Tribunal finds that the correct policy was used namely the disciplinary policy. The evidence was that the Surplus and Loss Procedure is not used for large sums which go missing or where there is a pattern. The evidence both from the Respondent's witnesses and from Mr Cochrane was that the disciplinary policy is used for these types of offences. The issue for the Respondent was a loss of trust in the Claimant. The Tribunal accepts the Respondent's submissions that as a long-standing employee and an employee who was a coach and a station supervisor, that the Claimant knew what should be done and that remedial training was not the issue. The Claimant's argument that he should have been given the chance to improve misses the point that large sums of money went missing from an organisation which is open to public scrutiny.
53. One of the points made by the Claimant about this policy is that he was not notified of the discrepancies within a 13-week period stipulated by that policy. Even had the Tribunal have found that the Surplus and Loss policy was the applicable policy, the Claimant was notified of all but two of the dates in question within a 13-week period.
54. The Tribunal finds that the Respondent had a genuine belief in the Claimant's guilt based on a reasonable investigation and given the nature of the matter that the decision to dismiss was within the range of reasonable responses

open to a reasonable employer.

55. The Tribunal does not find that the Claimant was unfairly dismissed.

Disability Discrimination

Direct discrimination

56. The Claimant complains that the following are acts of direct discrimination:

- a. Failing to notify the Claimant of the discrepancies in a timely manner – The Tribunal has found as set out above that the Surplus and Loss procedure was not the applicable procedure. In any event as found above the Tribunal found that of those dates investigated all but two were within the 13-week period. As a matter of fact, this allegation is not made out.
- b. Applying its financial procedures strictly – The Claimant suggests that the Respondent should not have applied financial procedures strictly and the fact that they did was a less favourable treatment on the grounds of his disability. The Tribunal finds that the Respondent was acting reasonably in applying its financial procedures strictly. It is accountable for its finances and is under public scrutiny in this respect. The evidence was that the Claimant was treated the same as those who did not have his disability. The clear evidence from Ms McConnell which is accepted is that of the comparators listed by the Claimant none of them had been referred to her which they would have done if a similar situation had arisen. The only one who was referred (Mr Surace) was different as the apparent losses were explained and reconciled on investigation. The Claimant's losses were not reconciled.
- c. Suspending the Claimant – The Claimant was suspended after Mrs McConnell had completed her investigation and had interviewed the Claimant. The Tribunal find that suspension was a reasonable step to have taken given the nature of the situation. The Claimant has not been able to point to anyone who did not have his disability, who was accused of the same thing and who was not dismissed.
- d. Investigating and initiating disciplinary action – given that the security company, the Finance Department and Ms McConnell did not know the identity of the employee involved when the investigation was done the reason for the investigation was not to do with the Claimant's disability. Given the size of the losses the Tribunal find that the Respondent was justified in initiating disciplinary action and the reason for this was not because the Claimant was disabled.
- e. Dismissing the Claimant – The Claimant was dismissed after a full investigation and CDI. There was no evidence that the Respondent wanted to get rid of the Claimant or that it had particular issues with him having a disability. Mr Stacey recommended him for promotion.

The Tribunal is satisfied that the Claimant was not dismissed because of his disability but because he was unable to account for large losses. Other employees were dismissed in the same or similar circumstances.

Discrimination arising from disability

57. The Claimant relies on the same matters as for his claim of direct disability discrimination.
58. The something arising relied on by the Claimant is the effect of medication on him. The Claimant said he was taking various medication as set out above which the Tribunal found he did not tell the Respondent. During his evidence, he gave different accounts of when he took his medication. The Claimant's witness statement says that when he took medication he was taken out of the ticket office. His oral evidence was contradictory saying that not only did he work in the ticket office when taking medication, but that he took it at night, or later in evidence took it at work. He said in evidence although this is not documented anywhere else that he fell asleep at work because of the medication. The Claimant said he did not take his medication all the time and then said he took it every day.
59. Given the Claimant's different accounts of what medication he was on, when he was taking the medication and what the effects of the medication were the Tribunal cannot rely on his oral testimony alone. There was no other evidence setting out the effects of any medication on him. The Tribunal does not therefore find this element of his claim to be made out.
60. Similarly, the Tribunal accepts the Respondent's submission regarding other employees assisting the Claimant being responsible for the losses. The evidence shows that on the days the Claimant was working, the POMs were not often emptied and if they were, it was just the note vaults that were emptied and not the coin vault except for one day when the coin vault was emptied. The Claimant's case in relation to whether he counted the notes has changed. He told the Respondent he did count the notes but contradicted this in his oral evidence to say that not only did he not count the notes, but he was not present when the notes were counted by his colleagues.
61. The Tribunal also accepts that even if these matters did arise from the Claimant's disability, that the Respondent was justified in the actions it took as it has a legitimate aim that staff, particularly those handling cash, maintain a high degree of integrity and can account for money in their possession. The Business Ethics Standard sets out a clear duty to account for money in an employee's control. Even though the Claimant says he did not see this (which given his role as a coach is surprising) he did say he understood his duty to account and the procedures involved.
62. Dealing with the specific matters in turn:
 - a. Failing to notify the Claimant of the discrepancies in a timely manner – the Tribunal has accepted the time it takes for an investigation to be

completed to know if there is a problem or just an issue which can be reconciled. The Tribunal does not find the time to be untimely as suggested or because of something arising from the Claimant's disability.

- b. Applying its financial procedures strictly – it would be surprising if the Respondent did not apply its financial procedures strictly in all cases. The procedures are there to protect the Respondent from loss and also to protect employees by ensuring that such steps are taken as can be to avoid losses occurring.
- c. Suspending the Claimant – In circumstances such as these, the Tribunal accepts that suspension is appropriate and is a proportionate way to investigate the allegations. The Tribunal note that there was no complaint from the Claimant or either of the two union representatives who accompanied him about the suspension. The claimant was suspended on full pay.
- d. Investigating and initiating disciplinary action – again this is a proportionate reaction to the allegations and the outcome of the investigation. The loss was significant and the Respondent reasonably considered disciplinary action to be appropriate. This was not something arising from the Claimant's disability.
- e. Dismissing the Claimant – the outcome of the two investigations done by Ms McConnell and Mr Tudor and the CDI was that the Respondent did not know what had happened to the money. It had explored all suggestions put forward by the Claimant and reasonably found that they were not plausible. Given the way the Claimant's evidence unfolded if he had acted in the way he did, i.e. not staying to supervise the servicing of the POM and not being there when the money was counted this would raise more issues in relation to his integrity and the trust that the Respondent could place in him.

63. The Claimant's claim of discrimination arising from disability is dismissed.

Indirect discrimination

64. The Claimant relies on four PCP's namely:

- a. Blind banking and reporting system
- b. The surplus and loss procedure
- c. The Business Ethics Stands
- d. And the strict adherence to the above policies and procedures.

65. The Respondent accepts that it applied a. and c. to the Claimant, and that b. would apply to him, but that it did not use this procedure. The Respondent

- submits that d. is not a proper PCP and adds nothing to the other PCPs in any event.
66. The Claimant relies on the medication he says he was taking and the effect he says it has on him and that the impairment to his hand meant that errors were more likely thus increasing the chance of disciplinary action being taken.
67. As set out above the Tribunal does not find the Claimant's evidence reliable and does not accept the Claimant's oral evidence about what medication he took, when he took it or its effect on him and there is no other evidence before it. The Tribunal knows from its own experience that medications have different effects on different people and can depend on the dose taken as well.
68. The Tribunal notes that the Claimant worked with his impairment and on his evidence whilst taking the medication for many months without errors being made. The Tribunal does not accept that any limitation there may be because of his hand condition would necessarily mean more errors. It may mean it is more difficult and slower to do his job, but not that errors are made. Mr Paul said he saw staff in ticket offices use one arm when for example they had a broken arm.
69. The Tribunal accept the Respondent's submission that there was no intention to discriminate and as set above the whole process was a proportionate means of achieving a legitimate aim.
70. The Claimant's claim of indirect discrimination fails.

Reasonable adjustments

71. The Claimant relies on the same PCP's as for his claim of indirect discrimination.
72. The Claimant did not say that any adjustment needed to be made to the counting of money. This only arose at the Tribunal. As set out above he positively told the Respondent that he did count the money and made no mention of any difficulties. At the CDI he said that if a colleague helped he was there all the time. At the Tribunal hearing he said he was not.
73. The Tribunal does not find that the blind banking system put the Claimant at a particular disadvantage and the duty to make adjustments did not therefore arise.
74. The Tribunal has found that the Surplus and Loss policy was not applied to the Claimant.
75. The Claimant was subject to the Business Ethics Standard as were all other employees. This is a requirement to account for money which is in their control. The policy does not put the Claimant at a disadvantage.

76. The Tribunal finds that any organisation and especially one under public scrutiny such as the Respondent would not find it reasonable to relax accounting rules. This would not be a reasonable adjustment as it would expose the Respondent to the risk of losses being made which could not be explained.

77. The Claimant's claims are dismissed.

Employment Judge Martin
Date: 23 January 2017

Appendix

Issues

A1. Unfair dismissal

- A1.1 Reason Did the Respondent genuinely believe that the Claimant had failed to account for the sum of £1,885.33 which resulted in a loss to the Respondent of that amount?
- A1.2 Was this the principal reason for the Claimant's dismissal or was there an ulterior motive?
- A1.3 Was this a reason relating to the conduct of the Claimant or a substantial reason of a kind such as to justify the dismissal of an employee holding the position which the Claimant held?
- A1.4 Reasonableness In the circumstances, did the Respondent act reasonably in treating this reason as a sufficient reason for dismissing the Claimant, taking into account its size and administrative resources and having regard to equity and the substantial merits of the case? This gives rise to the following sub-issues:
- A1.4.1 Did the Respondent carry out a reasonable investigation into the alleged misconduct?
- A1.4.2 Did the Respondent have reasonable grounds for believing the Claimant had committed the alleged misconduct?
- A1.4.3 Did the Respondent follow a fair procedure, taking into account the ACAS Code of Practice on Discipline and Grievances?
- A1.4.4 Was the decision to dismiss within the band of reasonable responses which a reasonable employer might have adopted?

A2. Disability Discrimination

- A2.1 Time. Has the Claimant brought his claims of discrimination within the time limit set by the Equality Act 2010? This gives rise to the following sub-issues:
- A2.1.1 What were the date of the acts to which the complaints relate?
- A2.1.2 Were the acts to which the complaints relate an element of conduct extending over a period? If so, when did that period end?
- A2.1.3 Insofar as the complaints relate to a failure to do something, when did the Respondent decide on it?
- A2.1.4 If not, is it just and equitable for the Employment Tribunal to extend time for the presentation of the complaint pursuant to the Equality Act 2010?
- A2.2 Fact of Disability. At the material time(s), was the Claimant a disabled person within the meaning of the Equality Act 2010, his disability being a hand injury.
- A2.3 Direct discrimination. Did the Respondent:
- A2.3.1 Fail to notify the Claimant of any discrepancies in a timely manner;
- A2.3.2 Apply its financial procedures and policies strictly to Claimant;

- A2.3.3 Suspend the Claimant;
- A2.3.4 Investigate and initiate disciplinary action;
- A2.3.5 Dismiss the Claimant.
- A2.4 In doing the act complained of, did the Respondent treat the Claimant less favourably than it treated employees who had similar financial discrepancies, who did not have a similar disability to that of the Claimant. Specifically the Claimant has named Mr Mustaq Patel, Mr Anton Surash and Mrs Brigitte Gorez, but he believes there are other employees (without his disability), who have not had disciplinary action taken against them and/or been dismissed in similar circumstances. The Claimant has requested further information from the Respondent in this regard and reserves his right to name other specific comparators once this information is received. The Respondent is considering that request.
- A2.5 Was there any material difference between the circumstances relating to the Claimant and the identified comparators?
- A2.6 If the Respondent treated the Claimant less favourably, was this because of the Claimant's alleged disability?
- A2.7 Discrimination arising from disability. Did the Respondent do the acts alleged at A3.3.1-3.3.5?
- A2.8 Was this unfavourable treatment?
- A2.9 Was the unfavourable treatment because of something arising (the accounting discrepancy) in consequence of the Claimant's disability?
- A2.10 Was the treatment a proportionate means of achieving a legitimate aim?
- A2.11 Indirect Discrimination. Did the Respondent apply a provision, criteria or practice (PCP) of:
 - A2.11.1 the blind banking and reporting system;
 - A2.11.2 the Surplus and Loss procedure;
 - A2.11.3 the Business Ethics Standards;
 - A2.11.4 the strict adherence to the above policies and procedures.
- A2.12 Did the Respondent apply the PCP in question to the Claimant?
- A2.13 Did the Respondent apply, or would the Respondent have applied, the PCP in question to people who did not have the same disability as the Claimant?
- A2.14 Did the PCP in question put, or would it have put, people who have the same disability as the Claimant at a particular disadvantage when compared with people who do not have the same disability as the Claimant?
- A2.15 Did the PCP in question put, or would it have put, the Claimant at that disadvantage?
- A2.16 Was the PCP a proportionate means of achieving a legitimate aim?
- A2.17 Duty to make reasonable adjustments. Did the Respondent apply the same PCP or was such a PCP applied on behalf of the Respondent?

- A2.18 Did the PCP in question put the Claimant at a substantial disadvantage in comparison with persons who are not disabled?
- A2.19 Did the Respondent know that the PCP in question put the Claimant at a substantial disadvantage, in comparison with persons who are not disabled, in relation to employment by the Respondent?
- A2.20 If not, could the Respondent reasonably have been expected to know that the PCP in question put the Claimant at a substantial disadvantage, in comparison with persons who are not disabled, in relation to employment by the Respondent?
- A2.21 Did the Respondent take such steps as it was reasonable to have to take to avoid the disadvantage caused by the PCP?
- A2.22 The Claimant believes that the Respondent should have taken the following steps:
- A2.22.1 relaxing the accounting rules;
 - A2.22.2 early notification or investigation of the discrepancies;
 - A2.22.3 making the employee who assisted the Claimant to bag his money dually responsible to account for it;
 - A2.22.4 not referring the Claimant for disciplinary action;
 - A2.22.5 taking the Claimant out of the ticket office if unable to relax the accounting rules.
- A2.23 Note The allegations of harassment and victimisation are withdrawn by the Claimant.
- A3. Wrongful dismissal/notice pay**
- A3.1 Was the Respondent entitled to terminate the Claimant's employment without notice?
- A4. Remedy**
- A4.1 If the Claimant was dismissed unfairly, what remedy or remedies is/are the Claimant entitled to as a result?
- A4.2 In the event that the Respondent is found to have unfairly dismissed the Claimant, should compensation be reduced to reflect that the Claimant contributed to his own dismissal; and/or the chance that the Claimant would have been dismissed in any event (in accordance with *Polkey v AE Dayton Services Ltd* [1987] IRLR 503)?
- A4.3 Has the Claimant taken reasonable steps to mitigate his loss?
- A4.4 What should the level of any injury to feelings award be, if the Respondent is found to have discriminated against the Claimant?